Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

AMERICAN ATLAS CORPORATION,

Petitioner,

vs.

ALLEGHENY COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICIES

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61 pp

QUESTION PRESENTED

1. Whether the Petitioner was entitled to an in person, oral hearing before the District Court pursuant to Federal Rule of Civil Procedure 56 prior to the District Court entering an Order granting the Respondent's Motion for Summary Judgment where the District Court Local Rule mandated an oral hearing on dispositive motions unless the court expressly excluded such a hearing, which the court did not do.

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IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN ATLAS CORPORATION, No.

Petitioner,

vs.

ALLEGHENY COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY,

Respondent.

Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit which was entered on September 13, 1995 is unreported. A copy of said Opinion is included herein as part of Appendix A.

The Opinion of the United States District Court for the Western District of Pennsylvania which was entered on December 16, 1994 is also unreported. A copy of said Opinion is included herein as part of Appendix B.

Statement of Jurisdiction

The judgment for which review is being sought from this Honorable Court is the Third Circuit Court of Appeals' decision of September 13, 1995 affirming the December 16, 1994 decision of the United States District Court for the Western District of Pennsylvania which granted summary judgment in favor of the Respondent herein.

The Third Circuit Court of Appeals reviewed the District Court's decision pursuant to 28 U.S.C. Section 1291. This Honorable Court has jurisdiction to review this matter pursuant to 28 U.S.C. Section 1254 (1).

Statutory Provisions Involved

Federal Rule of Civil Procedure 56 states as follows:

> (a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment

by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material

facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is no in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bade faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Federal Rule of Civil Procedure 78 states:

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the

advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Western Pennsylvania District Court

Local Rule 7.1(f) states:

Dispositive motions shall be resolved within 90 days of their filing, on briefs and oral argument, unless oral argument is expressly precluded by the court. Any motion that is not resolved within 90 days of its filing shall be scheduled for oral argument by the clerk of court

Constitution Of The United States, Fifth

Amendment, states:

No person shall be deprived of life, liberty or property without due process of law.

Statement of the Case

In October, 1988, the Respondent, Allegheny County Industrial Development Authority (hereinafter referred to as "ACIDA"), acquired the former USX steelmaking facilities in the municipalities of Duquesne and McKeesport, State of Pennsylvania. The purpose of ACIDA's acquisition was to demolish the USX facilities so that the sites on which they stood could be redeveloped for other industrial and commercial uses.

Thus, in early 1989, ACIDA advertised and requested bids for demolition of the facilities. The bids were also to account for environmental remediation of both areas.

On May 12, 1989, ACIDA opened the eight (8) bids that had been received and determined that the bid submitted by the Petitioner American Atlas Corporation (hereinafter referred to as "American"), was the one which would be accepted. The bid was

accepted formally on July 7, 1989, when ACIDA's Board of Directors voted to adopt a resolution awarding the contract to American.

Pursuant to the contract awarded to American, American was to provide a variety of documents, namely, a letter of credit, a performance bond, a labor and materialman's bond, a certificate of insurance and no lien agreements. These requirements were conditions connected to the contract awarded and not the bidding process. No other bidder was required to provide the aforementioned documentation, only the successful bidder, American, to whom the contract had been awarded.

Each and every one of the aforementioned contract requirements was substantially complied with by American, or involved situations whereby ACIDA frustrated American's efforts to comply. ACIDA unreasonably refused to accept items which

were in substantial compliance with the award requirements and added newer and more stringent conditions than the award called for, and failed to provide direction and/or forms which it was required to do pursuant to the contract and which would have allowed American to comply.

On August 23, 1989, ACIDA formally breached its contract with American. Although American had followed all bidding instructions, submitted the lowest bid, substantially performed all of the necessary precommencement work conditions required under the contract, and was ready, willing and able to perform under the contract, ACIDA refused to issue notice to proceed, and decided to rebid the project.

B. Procedural Background

On July 24, 1991, American filed a Complaint in the District Court for the

Western District of Pennsylvania against ACIDA for breach of contract.

On July 29, 1991, the matter was referred to United States Magistrate Judge Gary L. Lancaster for pretrial proceedings.

ACIDA responded to American's Complaint on September 16, 1991 by filing a Motion to Dismiss along with an Affidavit of Joseph Hohman, ACIDA's executive director. The crux of ACIDA's Motion to Dismiss was its' allegation that no contract had ever been formed between the parties, and thus there was no contract to breach.

On November 15, 1991, American filed a Response to ACIDA's Motion to Dismiss, along with an accompanying Brief in support thereof and an Affidavit of Martin J. Haitz, CEO of American.

For over seven months after the filing of the Response by American, no further filings took place in the instant action.

Periodically during that seven month period, counsel for American would contract the Magistrate Judge's office to inquire as to this matter's progress. The response was that counsel would be informed when any action had been taken.

In July of 1992, counsel for ACIDA requested an enlargement of time in which to reply to American's brief in Opposition to ACIDA's Motion to Dismiss. ACIDA's request was granted and on July 17, 1992, eight months after American's Brief had been filed, ACIDA filed its reply.

On October 27, 1992, Magistrate Judge Lancaster issued a document entitled "Report" which stated that ACIDA's Motion to Dismiss was to be treated as a Motion for Summary Judgment because affidavits had been filed in addition to the pleadings. The report went on to state that there was no binding contract between the parties and that ACIDA's

Motion for Summary Judgment should be granted.

American filed Objections to the Magistrate Judge's Report, and the District Court, after a de novo review of the pleadings and documents in the case, remanded the matter back to the Magistrate Judge to allow American to conduct discovery to support its opposition to ACIDA's Motion to Dismiss which was to be treated as a Motion for Summary Judgment. ACIDA's motion was, for the time being, denied without prejudice.

Thereafter, discovery was conducted and Pre-trial statements were filed by the parties. On December 27, 1993, the case was deemed no longer referred to the Magistrate Judge and the Honorable Donlad J. Lee took personal charge of the matter.

In January of 1994, ACIDA filed a Motion for Summary Judgment which essentially mirrored the Motion to Dismiss which it had

filed earlier. American filed appropriate responses to said Motion for Summary Judgment.

The district court held a pre-trial conference on February 23, 1994 and issued an Order dated March 17, 1994 scheduling trial dates, future status conferences, when to submit voir due questions, etc. The district court issued said Order despite the pending Motion for Summary Judgment of ACIDA.

With no decision having been made in regard to the Motion for Summary Judgment of ACIDA, the parties continued to act in accordance with the district court's order of March 17, 1994 such as, preparing and marking trail exhibits and submitting proposed jury instructions.

In October of 1994, over seven months after ACIDA's Motion for Summary Judgment had been filed and over six months after the pre-trial conference before Judge Lee, the

parties were sent a letter from the Honorable Roderick R. McKelvie of the District Court for the District of Delaware which stated that the case had been reassigned to Judge McKelvie. No notice or hearing regarding such reassignment had occurred. It was determined that the schedules regarding the trial and pre-trial matters which had been established by Judge Lee pursuant to the district court's March 17, 1994 Order would be set aside pending Judge McKelvie's decision regarding the pending motion for summary judgment.

On December 14, 1994, Counsel for American received a telephone call from Judge Lee's Clerk informing Counsel that the case had been reassigned back to Judge Lee. No motion for reassignment, no notice of reassignment nor any hearing on the reassignment occurred. Further, no mention of the assignment to Judge McKelvie or the

reassignment back to Judge Lee appeared of record on the docket.

Two days after the call from Judge Lee's Clerk to Counsel for American, the district court issued an Opinion and entered an Order granting ACIDA's Motion for Summary Judgment.

American had never set foot in a courtroom other than for pre-trial conferences in the three and one half years since the case had been commenced.

American appealed the District Court's decision to the Third Circuit Court of Appeals, which had jurisdiction to hear such appeal pursuant to 28 U.S.C. Section 1291, submitting that the District Court had been in error as to the merits of the case, that the transfer and re-transfer of the case between judges without any notice to the parties was a due process violation and that the granting of summary judgment by the Court without having conducted a hearing was

improper. The Third Circuit Court of Appeals affirmed the District Court's decision.

In its opinion affirming the District Court's decision, the Third Circuit Court of Appeals stated that the opportunity to submit its position in writing was all that American was entitled to do under the Federal Rules and the Constitution and that it was not entitled to an oral hearing before the Court prior to the entry of summary judgment.

American respectfully submits that the Third Circuit Court of Appeals is in error in regard to its decision that a hearing is not required prior to a determination on a motion for summary judgment in light of the Western Pennsylvania District Court Local Rule which exists in regard to summary judgment motions and the plain meaning of F.R.C.P. 56. Further, American notes that there is a conflict among the Circuit Courts of Appeal regarding the requirement of a hearing in

such situations. As a result, American is seeking this Honorable Court's review of the issue.

Argument; Basis For Granting Writ of Certiorari

A. Certiorari Should Be Granted Because The Third Circuits' Holding In This Case As To Whether An Oral Hearing Is Required Before A Summary Judgment Can Be Entered Is In Conflict With The Plain Meaning Of The Word "Hearing" As Set Forth In F.R.C.P. 56, With The Local Rule Of The District Court Involved In This Case, With The Holdings Of Other Circuit Courts Of Appeal, With Prior Holdings Of The Third Circuit And The Fifth Amendment To The Constitution Of The United States

The Third Circuit's ruling that no hearing is required prior to the entry of a decision on a motion for summary judgment is in conflict with the plain meaning of Federal Rule of Civil Procedure 56, Western Pennsylvania District Court Local Rule 7.1, the decisions of other Circuit Courts of Appeal, prior decisions of the Third Circuit Court of Appeal and the Fifth Amendment to the Constitution of the United States.

FRCP 56(c) contemplates a hearing on a motion for summary judgment before its determination. As this Honorable Court has recognized, a rule or statute is to be interpreted by its plain meaning. Taylor v. Freeland & Kronz, 503 U.S. 638, 644, 112 S. Ct. 1644, 1650, 118 L.Ed 2d 280, 288 (1992). FRCP 56 (c) specifically calls for a hearing and makes no mention of a submission of the matter on briefs. A plain reading of the rule indicates that an oral hearing before the Court is required.

Pursuant to FRCP 78, a District Court may "make provision by Rule or Order for the submission and determination of motions without oral hearing upon brief written statements or reasons in support and opposition."

However, the District Court for the Western District of Pennsylvania has made no

such Rule or issued no such Order in regard to summary judgment motions.

Western Pennsylvania District Court Local Rule 7.1 (f) states:

> Dispositive motions shall be resolved within 90 days of their filing, on briefs and oral argument, unless oral argument is expressly precluded by the court. Any motion that is not resolved within 90 days of its filing shall be scheduled for oral argument by the clerk of court. (emphasis added).

Thus, local rule 7.1 (f) mandates an oral hearing on a motion for summary judgment unless oral argument is expressly precluded by the court which was not done in this case. In fact, the parties were not aware of which particular judge of the court was presiding over the matter due to the transfer and re-transfer of the matter between judges without notice to the parties.

As a result, the granting of summary judgment in favor of ACIDA without an oral

hearing was in violation of the plain meaning of FRCP 56(c) and Western District Court Local Rule 7.1(f).

The Third Circuit Court of Appeals, in affirming the District Court's grant of the summary judgment motion without a hearing, stated that the precedent of the Third Circuit established that no oral hearing was required before the entry of summary judgment. The Court's opinion cited two cases in support of that statement. The first was the case of Anchorage Associates v. Virgin Islands Board of Tax Review, 922 F.2d 168 (3d Cir, 1990). The holding therein regarding the necessity of an oral hearing in regard to summary judgment motions was narrow and dealt only with specific factual situations. The Court held:

> When a party having the burden of proof files a motion for summary judgment to which there is no response, and the court determines that the moving party is entitled to judgment as a matter of

law based on the facts presented in the motion, we believe that neither a hearing nor consideration of the Poulis factors are required before judgment is entered. Id. at 176.

That holding however, was inapplicable to the instant case in that American did file a response to the summary judgment motion in this case.

The second case cited by the Third Circuit Court of Appeals was United States v. Prudential Insurance Company, 944 F.2d 1149 (3d Cir. 1991). In dicta, the Prudential court stated,"... we have held that "hearing" in Rule 56 does not require an oral hearing be held before judgment is entered. (citation to Anchorage)." Id. at 1155.

Not only does the dicta statement in Prudential overstate the breadth of the holding in Anchorage, but it further ignores prior holdings of Third Circuit Court of Apppeals. In Season-All Industries, Inc. v. Turdiye Sise Ve Cam Fabrikalari, 425 F.2d 34

(3d Cir. 1970), the court stated, "...we believe that it is undesirable in general for a district court to enter summary judgment after receiving briefs and without holding a hearing unless it makes clear in its order that all affidavits and counter-affidavits must be filed with the briefs." Season-All, supra at 39.

In Sames v. Gable, 732 F.2d 49 (3d Cir., 1984), the court faced the issue of whether the granting of a summary judgment was proper where there remained outstanding discovery requests and where no hearing had been held. The court held that the granting of the summary judgment motion had been error due to the outstanding discovery. Id. at 52. The court further criticized the district court for granting the motion for summary judgment without having scheduled a hearing and cited Season-All, Id.

In the case of Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309 (3d Cir., 1994), the court stated:

> We also think a district court should be wary before granting summary judgment without conducting a hearing. (citing Season-All and Sames). Id. at 1315.

Thus, the Third Circuit has never held that an oral hearing may be dispensed with prior to the entry of summary judgment in any and all situations as was stated in the Third Circuit's opinion in this case. In particular, there is no authority for dispensing with such an oral hearing in violation of a local rule as is the case herein. On the contrary, the entry of a summary judgment without an oral hearing is a practice which is not at all favored as is demonstrated by the foregoing case citations.

Local Rules for other districts have provided for a party desiring an oral hearing to apply for one, and that the failure to so

apply acts as a waiver of an oral hearing. It is well settled that such local rules are proper and constitutionally sound. Dredge v. Penny, 338 F.2d 456 (9th Cir. 1964); Dayco v. Goodyear Tire, 523 F.2d 389 (6th Cir. 1975); Yamaha Corporation of America v. Stonecipher's Baldwin Pianos & Organs, Inc, 975 F.2d 300 (6th Cir. 1992).

However, no such local rule exists in the Western Pennsylvania District Court. On the contrary, Local Rule 7.1 actually mandates an oral hearing before the court in said district unless the court expressly precludes said hearing, which was not done in this case.

The failure to provide for an oral hearing in contravention of a local rule has been deemed erroneous. In Jasinski v. Showboat Operating Company, 644 F.2d 1277 (9th Cir. 1981) the court found that the district court's entry of summary judgment

without a hearing despite a local rule requiring oral argument on all summary judgment motions unless waived by all parties was error.

Further, it has been held that a local rule which precludes oral argument, or even the right of party to request oral argument, is in violation of Rule 56. Bagby v. United States, 199 F.2d 233 (8th Cir. 1952). See also Dredge v. Penny, supra.

In light of the foregoing, the Third Circuit's decision in this case, that no oral argument is required prior to the entry of summary judgment, despite the local rule mandating such a hearing and despite no local rule providing for the application for such a hearing, is error. Said decision conflicts with the decisions of other Circuit Courts of Appeal as well as the prior decisions of the Third Circuit Court of Appeals. The decision ignores the applicable local rule and is at

odds with the plain meaning of Rule 56. Further, if the court can enter summary judgment without a hearing and there exists no local rule providing for a party to apply for a hearing, then the due process provisions of the Fifth Amendment to the United States Constitution are violated.

As a result, the Petitioner, American Atlas Corporation, respectfully submits that certiorari should be granted by this Honorable Court.

Conclusion

Based upon all of the foregoing, it is respectfully submitted that American Atlas Corporation's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

12/11/95

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APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3044

AMERICAN ATLAS CORPORATION,

Appellant

v.

ALLEGHENY COUNTY INDUSTRIAL
DEVELOPMENT AUTHORITY

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 91-CV-01241)
District Judge: Hon. Donald J. Lee

Submitted Pursuant to Third Circuit LAR 34.1(a) September 11, 1995

Before: SLOVITER, Chief Judge, Alito, Circuit Judge and RENDELL, District Judge

(Opinion Filed)

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* Hon. Marjorie O. Rendell, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM OPINION

SLOVITER, Chief Judge.

American Atlas Corporation appeals from the district court's order granting summary judgment to the Allegheny County Industrial Development Authority (hereafter "ACIDA"), the defendant in its suit for breach of contract. The district court had jurisdiction under 28 U.S.C. Section 1332, we have jurisdiction under 28 U.S.C. Section 1291. The parties agree that Pennsylvania law applies.

I.

ACIDA issued an invitation to bid package dated March 9, 1989 for demolition and environmental remediation work at two sites holding former USX steel facilities. This package included a document entitled "Demolition/Machiner Sale Specifications" requiring that the contractor obtain various types of insurance coverage, two surety bonds

(one a performance bond of $28 million and the other a labor and materialmen bond of $28 million) and a "no lien" contract.

In a board resolution dated July 7, 1989, ACIDA conditionally awarded the contract to American Atlas. This resolution required, among other items, that Atlas furnish the insurance coverage and two surety bonds, as well as an irrevocable line of credit of $2.144 million and a letter of credit of $45 million from the purchaser of the sites' ferrous scrap. American Atlas was given 14 days to fulfill these conditions, a deadline later extended to August 10, 1989.

American Atlas failed to submit certain of the documents required in the specifications. For example, it submitted various letters of credit in lieu of a performance bond or a labor and materialmen's bond. It submitted a certificate of insurance, but it did not include the

required environmental and hazardous waste insurance coverage. ACIDA refused to accept these as adequate substitutes and rebid the contract.

American Atlas filed a complaint alleging breach of contract by ACIDA. The magistrate judge to whom the matter had been referred treated ACIDA's motion to dismiss as one for summary judgment and recommended that it be granted, but the district court denied the motion without prejudice to allow further discovery. The case was then reassigned to a district judge from the District of Delaware for over a year, but was assigned back to the original district judge in December of 1994. That judge issued the opinion an order granting summary judgment to ACIDA on December 16, 1994. We exercise plenary review.

II.

It is American Atlas's central argument that ACIDA had accepted its bid, that as a result this formed a valid and binding contract existing between them, and that submission of the insurance policy and various letters of credit should be considered under a substantial compliance doctrine found in general contract law. American Atlas concedes that under Pennsylvania law bidding instructions in public contracts must be strictly followed for a bid to be valid. City of Phila. v. Canteen Co., 581 A.2d 1009, 1013 (Pa. Commw. Ct. 1990) (citing Nielson v. Womer, 406 A.2d 1169 (Pa. Commw. Ct. 1979)).

The district court held that "ACIDA conditionally awarded a contract to plaintiff American Atlas Corporation provided that it meet certain terms and conditions of the award," App. at 6, "that the terms of the

invitation to bid and proposed contract terms regarding the bonds were clear and unambiguous, as a matter of law, and that plaintiff's failure to furnish the required bonds meant there was no contract with American Atlas because its bid was not in conformity with the invitation to bid requirements." App. at 7. We agree that there was no binding contract essentially for the reasons set forth by the district court.

In light of this conclusion, we need not consider American Atlas's argument that it complied or substantially complied with the conditions imposed by ACIDA's board.

III.

American Atlas claims that it was entitled to a hearing in advance of the district court's grant of summary judgment. This argument proceeds on the erroneous impression that a party is entitled to the opportunity to have an oral hearing before

summary judgment may be entered against it. Our precedent is to the contrary. We have explained:

> While Rule 56 speaks of a "hearing," we do not read it to require that an oral hearing be held before judgment is entered. An opportunity to submit written evidence and argument satisfies the requirements of the rule.

Anchorage Assocs. v. V.I. Bd. of Tax Review, 922 F.2d 168, 176 (3d Cir. 1990) (footnote omitted). See also United States v. Prudential Ins. Co., 944 F.2d 1149, 1155 (3d Cir. 1991).

ACIDA filed its motion for summary judgment on January 24, 1994. American Atlas filed both a brief in opposition to the motion and a reply brief to ACIDA's reply brief. Clearly it had notice and availed itself of the opportunities provided to submit its position in writing. It is entitled to no more under the Federal rules or the Constitution.

IV.

Finally, American Atlas claims a due process violation because this case was reassigned to a district judge from another district within the circuit, and it was later transferred back to the original judge in the Western District of Pennsylvania who decided the motion for summary judgment.

This case is unlike Swindell-Dressler Corp. v. Dumbauld, 308 F.2d 267 (3d Cir. 1962), on which American Atlas relies. In that case, the district court had failed to give any notice, hearing, or the opportunity to be heard before transferring a case pursuant to 28 U.S.C. Section 1404(a) to another district. In this case there was no transfer of the case to another district. All that occurred was that the case was reassigned to another judge.

We know of no authority that finds a due process issue in such a transfer. In

considering the transfer of a case form one judge to another within the district, we have referred to the "presumption that assignment of cases is primarily the province of the district court -- a province we will not invade without significant justification." United States v. Baylin, 696 F.2d 1030, 1042-43 (3d Cir. 1982). We see no reason why any due process issue arises because the assignment is to a judge from another district in the circuit. Indeed, such an assignment of a judge is expressly authorized by 28 U.S.C. Section 292(b) which provides that the chief judge of the circuit "amy, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." The same statute also provides authority for the Chief Justice of the United States to "designate and assign temporarily a district judge of one circuit

for service in another circuit,...upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises." 28 U.S.C. Section 292(d).

American Atlas has shown no prejudice from the assignment and reassignment. See, e.g., United States v. Claiborne, 870 F.2d 1463, 1467 (9th Cir. 1989); United States v. Simmons, 476 F.2d 33, 35-36 (9th Cir. 1973). Indeed, the federal judiciary would be hobbled if cases could not be transferred when a judge becomes overworked or il, or when the other branches of government fail to fill judicial vacancies promptly.

For the foregoing reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

_____
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3044

AMERICAN ATLAS CORPORATION,

Appellant

v.

ALLEGHENY COUNTY INDUSTRIAL
DEVELOPMENT AUTHORITY

On Appeal from the United States District
Court for the Western District of
Pennsylvania (D.C. No. 91-cv-01241)
District Judge: Hon. Donald J. Lee

Before: SLOVITER, Chief Judge, Alito, Circuit Judge and RENDELL, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on September 11, 1995.

On Conmsideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered December 16, 1994 be, and the same is, hereby affirmed.

Costs taxed against appellant.

Attest:

Clerk

* Hon. Marjorie O. Rendell, United States Distrct Judge for the Eastern District of Pennsylvania, sitting by designation.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN ATLAS CORPORATION,

Plaintiff,

vs. Civil Action No. 91-1241

ALLEGHENY COUNTY INDUSTRIAL
DEVELOPMENT AUTHORITY,

Defendant.

MEMORANDUM OPINION

December 16, 1994

Before the Court is defendant's motion for summary judgment. After consideration of the motion and accompanying exhibits, plaintiff's response and exhibits in opposition, and the briefs and respective reply briefs in support of and in opposition to the motion for summary judgment, the Court holds there are only legal disputes regarding contract formation and interpretation at issue, and that resolution of those disputes clearly favors defendant.

Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows:

> [Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In interpreting Rule 56(c), the United States Supreme Court has stated:

> The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must view the facts in a light most favorable to the non-moving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. Id., 477 U.S. at 242. The "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.'" Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978), quoting Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). Final credibility determinations on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. Josey v.

Hollingsworth Corp., 996 F.2d 632 (3d Cir. 1993); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224 (3d Cir. 1992).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Petruzzi's IGA Supermarkets, 998 F.2d at 1230. When the non-moving party's evidence in opposition to a properly supported motion

for summary judgment is "merely colorable" or "not significantly probative," the Court may grant summary judgment. Anderson, 477 U.S. at 249-50.

Pennsylvania Contract Law and Public Contract Bidding Requirements

The following general rules obtain in this diversity case in which, as the parties agree, Pennsylvania law applies. A court's purpose in examining a contract is to interpret the objectively manifested intent of the parties; where the terms of the contract are not ambiguous (i.e., not susceptible of two or more reasonable interpretations), the court will interpret the contract as a matter of law; where the terms of the contracts are ambiguous, then the interpretation of the contracts is left to the finder of fact to resolve any ambiguity in light of all intrinsic and extrinsic evidence. Hullett v. Towers, 38 F.3d 107,

109 (3d Cir. 1994), relying on, inter alia, Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009-11 (3d Cir. 1980).

The court, perhaps obviously, makes the preliminary determination of whether the contract is ambiguous. Id. Conflicting conclusions or inferences "as to the interpretation of a written contract which is clear and unambiguous as to its terms will not create a material issue of fact to bar a disposition of summary judgment." Kane Gas, Light & Heating Co. v. Pennzoil Co., 587 F.Supp. 910, 911-12 (W.D. Pa. 1984). Summary judgment is only appropriate in cases involving interpretation of a contract where its meaning is unambiguous. United States ex rel. SBA v. Stanko, 1993 U.S. Dist. LEXIS 18717 at *2 (e.D. Pa. 1992) (citations omitted).

In the public arena, "[b]id instructions set forth in an invitation to bid are

mandatory and must be strictly followed fore the bid to be valid. Nielson v. Womer, 46 Pa. Commonwealth Ct. 283, 406 A.2d 1169 (1979)." City of Philadelphia v. Canteen Co., a Division of TW Services, Inc., 135 Pa. Commonwealth Ct. 575, 583, 581 A.2d 1009, 1013 (1990). See also Highway Express Lines, inc. v. Winter, 414 Pa. 340, 200 A.2d 300, 303 (1964) (public entity has the right to refuse to contract with any bidder who does not meet the bidding conditions), cited in Skepton v. East Penn School Dist., 1994 U.S. DIST. LEXIS 16735, *26 (e.D. Pa. 1994); Whitemarsh Township v. Finelli Bros. 408 Pa. 373, 184 A.2d 512 (1962); Clemson Corp. v. McKeesport Area School Dist., 87 Pa. Commonwealth Ct. 374, 487 A.2d 103, 105 (1985) (where contractor's bid did not satisfy specifications, Board's resolution initially awarding job to contractor did not create a binding contract).

Where the invitation to bid specifies "performance bonds" are to be furnished as a condition to execution of a contract with the municipality, the contractor's attempted substitution of a letter of credit did not a contract make, despite the contractor's contention the letter of credit was a commercially acceptable substitute; a public authority simply has no obligation to accept substitutes for the full measure of compliance with its bid invitations. City of Philadelphia v. American Coastal Indus., Inc., 704 F.Supp. 587, 591 (E.D. Pa. 1988).

Allegheny County Industrial Development Authority ("ACIDA") solicited bids for certain demolition and environmental remediation work by means of an invitation to bid package of materials dated March 9, 1989. Motion for Summary Judgment, Exhibit A1. The Bidding Instructions stated that the ACIDA reserved the right to "reject any or all bids

for any reason whatsoever," and also required each bidder to submit a bidder's bond in the amount of $3,000,000 to indemnify the ACIDA in the event the

> Bidder shall not effectively execute the Contract with Surety as required under the Contract, and all other Contract Documents required to be executed by the Bidder within ten (10) days . . . after the . . . notice by ACIDA to the Bidder stating that the Contract has been awarded to the Bidder and that the Contract Documents are prepared for signature. . . .

ACIDA;s invitation to bid package also included "Demolition/Machinery Sale Specifications" which required, among other things, that the Contractor obtain and maintain comprehensive general liability, workmen's compensation, automobile liability and hazardous waste generation and handling insurance. The Specifications also required the following:

> 19. PERFORMANCE BOND
>
> The Contractor shall deliver to ACIDA a performance bond in the

> amount of Twenty Eight Million Dollars ($28,000,000), conditioned for the faithful performance of the Contract, in accordance with all the terms and provisions thereof. . . <u>ACIDA reserves the right to reject any bond furnished when it is in the best interest of ACIDA to do so</u>. . . The date of the bond must be the same as the date of execution of the Contract.
>
> 20. LABOR AND MATERIALMEN'S BOND
>
> The Contractor shall furnish to ACIDA a labor and materialmen's bond in the amount of Twenty Eight Million Dollars ($28,000,000). . .<u>ACIDA reserves the right to reject any bond furnished when it is in the best interest of ACIDA to do so</u>. . . The date of the bond must be the same as the date of execution of the Contract.

Motion for Summary Judgment, Exhibit A1, Demolition/Machinery Sales Specifications at 12 (emphasis added).

By resolution of July 7, 1989, the ACIDA conditionally awarded a contract to plaintiff American Atlas Corporation provided that it meet certain terms and conditions of the award, including that it furnish the Twenty Eight Million Dollar Performance and Labor

and Materialmen's Bonds required by the Specifications of the invitation to bid package within 14 days. Id., Exhibit A2, 1 A and B. Although ACIDA extended the time until August 10, 1989 to permit American Atlas additional opportunity to comply with the bond and other requirements, American Atlas did not furnish the required bonds.

American Atlas did submit letters of credit and other "commitments" from certain insurance companies on August 23, 1989, which it offered as a substitute for the required bonds, but the ACIDA refused to accept these financial assurances in substitution therefore. As the Chief Executive Offer (CEO) of American Atlas conceded, it never presented a performance bond or a labor and materialmen's bond as required by paragraphs 19 and 20 of the Specifications and paragraph 1 of the resolution. Deposition testimony of Martin J. Haitz, Motion for Summary Judgment,

Exhibit B, at 31-34. The bid was therefore withdrawn, pursuant to ∫3 of the July 7th resolution stating that, in the event American Atlas fails to comply with the conditions of ∫1 of the resolution, "this contract award shall be null and void unless the board authorizes an extension thereto."

The Court quite agrees with defendant that the terms of the invitation to bid and proposed contract terms regarding the bonds were clear and unambiguous, as a matter of law, and that plaintiff's failure to furnish the required bonds meant there was no contract with American Atlas because its bid was not in conformity with the invitation to bid requirements. American Coastal Indus.; Canteen Co. It is "well settled that the specifications set forth in a bidding document are mandatory and must be strictly followed." Kimmel v. Lower Paxton Township,

159 Pa. Commonwealth Ct. 475, 633 A.2d 1271, 1274-75 (1993).

Although the plaintiff argues it provided financial backing that was the substantial equivalent of the required performance and labor and materialmen's bonds, the Curt finds that it has not met its burden of pointing to evidence of record to support such assertions. The Court disagrees with the legal opinion offered in the affidavit of its CEO, Martin Haitz, and its expert witnesses that these bond requirements were "substantially met" by certain letters of credit and insurance plans/commitments to which plaintiff alludes. On the record before the Court, there is no evidence to support plaintiff's claims that it did offer commercially acceptable substitutes for the required bonds.

Moreover and perhaps more importantly, as American Coastal makes clear, ACIDA is not

obligated to accept even commercially acceptable substitutes for the performance and labor/material bonds specifically demanded by the bidding invitation and ACIDA's resolution of July 7, 1989.

Plaintiff's response to defendant's properly supported motion for summary judgment is simply not significantly probative and does not even raise a metaphysical doubt as to the existence of a genuine issue of material fact. Because there is none, defendant's motion for summary judgment will be granted. 1

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1 The Court expresses no opinion on defendant's alternative bases for summary judgment, namely that in several other particulars, plaintiff failed to comply with the bid specifications, that it has no standing to pursue its lawsuit, and that it is estopped from doing so in any event.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN ATLAS CORPORATION,

Plaintiff,

vs. Civil Action No. 91-1241

ALLEGHENY COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY,

Defendant.

ORDER

AND NOW, this 16th day of December, 1994, it is HEREBY ORDERED that Defendant's Motion for Summary Judgment (Document No. 34) is GRANTED, and judgment is entered in favor of the defendant and against the plaintiff.

Donald J. Lee
United States District Judge

cc: Leonard Yelski, Esq.
Robert O Lampl, Esq.
Henry M. Sneath, Esq.

FILED
JAN 8 1996
OFFICE OF THE CLERK

No. 95-943

In The Supreme Court of the United States

October Term, 1995

AMERICAN ATLAS CORPORATION,

Petitioner,

v.

ALLEGHENY COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a factually warranted and substantively correct summary judgment should be set aside due to the absence of a pre-disposition oral hearing when the non-moving party cannot demonstrate any articulable harm resulting from the omission of a hearing, when it never requested such a hearing in the first instance, and when it had and utilized its ample opportunities to offer written evidentiary and legal arguments against the summary judgment motion?

LIST OF PARTIES

The petitioner—plaintiff and appellant below—is American Atlas Corporation. The respondent—defendant and appellee below—is the Allegheny County Industrial Development Authority. The authority is a public body which serves the greater Pittsburgh area.

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COUNTERSTATEMENT OF THE CASE

The petitioner's procedural statement (Petition for Writ of Certiorari, at 9-17) is generally accurate but incomplete.

Petitioner conveniently ignores the fact that it had ample time to respond to the summary judgment motion, which was filed on January 24, 1995. (S.A. 3).[1] At a February 23 pretrial conference, District Judge Lee ordered that a response be filed by March 10, 1994. (S.A. 6). By agreement of counsel, the response date was extended to March 31, 1994. (S.A. 4, 6-7). On March 31, petitioner filed a brief, an affidavit, and a document described as a response to the summary judgment motion. (S.A. 4). After the Allegheny County Industrial Development Authority filed a reply brief on May 31, 1994, the petitioner obtained leave of court and, then, an extension to file a surreply by July 24, 1994. (S.A. 4). The petitioner's last brief was filed on July 19, 1994. (S.A. 4).

Petitioner never requested an oral argument or any other oral hearing until it filed its appellate brief in the Third Circuit.

COUNTERSTATEMENT OF THE FACTS

During the Spring of 1989, the Allegheny County Industrial Development Authority prepared, advertised and requested bids by circulating to pre-qualified bidders a set of proposed contract documents and addenda (collectively referred to as the proposed contract documents), pursuant to which the successful bidder would undertake the required demolition and environmental remediation and machinery, equipment and other material sales to be performed on certain real property located in the cities of Duquesne and McKeesport, Allegheny County, Pennsylvania. (S.A. 18-20, 35-122). The proposed contract documents (S.A. 35-122) included, *inter alia*, the following as key conditions to the entry into a contract with the successful bidder:

---

[1]All references to "S.A." relate to materials contained in the supplemental appendix filed with the Third Circuit.

1. establishment and delivery to the Allegheny County Industrial Development Authority of a letter of credit issued by a federally insured commercial lending institution in favor of the Allegheny County Industrial Development Authority in an amount based on the amount of the successful bid ("Letter of Credit") (S.A. 21, 56-57);

2. delivery to the Allegheny County Industrial Development Authority of a performance bond in the amount of $28,000,000 in the form attached to the bid documents and issued by a company meeting certain financial rating standards ("Performance Bond") (S.A. 21-22, 55, 64, 69, 71-74);

3. delivery to the Allegheny County Industrial Development Authority of a labor and materialmen's bond in the amount of $28,000,000 in the form attached to the bid documents and issued by a company meeting certain financial rating standards ("Payment Bond") (S.A. 22-23, 64, 69, 75-78);

4. securing of comprehensive general liability insurance, workmen's compensation insurance, automobile liability insurance, and hazardous waste/environmental insurance in specified amounts evidenced by certificates of insurance issued by an insurance company or companies meeting certain financial rating standards, authorized to do business in Pennsylvania, "prior to or contemporaneously with the execution, of the proposed contract" ("Certificate of Insurance") (S.A. 23-24,49-50, 68-69); and

5. execution and recording of a no lien contract ("No Lien Contract") (S.A. 24, 51).

On May 12, 1989, the Allegheny County Industrial Development Authority formally opened all bids received, including

that of petitioner. (S.A. 25). Petitioner was the apparent best bidder based solely on cost. (S.A. 25). However, it did not produce a bid bond in the substance or form required by the documents. Furthermore, it did not deliver the required letter of credit, performance bond, labor bond, certificate of insurance, or no-lien agreement required by the bid documents. (S.A. 29-32). Throughout the ensuing several weeks, the Allegheny County Industrial Development Authority conducted a due diligence investigation and continued negotiations with petitioner to determine whether it could, in fact, meet the requirements of the bid documents and thus be the lowest responsible bidder. (S.A. 25). By resolution dated July 7, 1989, it conditionally awarded a contract to petitioner. (S.A. 25-27, 123-27). The July 7 resolution (S.A. 123-27) specifically stated that the award was subject to petitioner meeting certain terms and conditions within 14 days, including: (a) the aforementioned performance bond; (b) the payment bond; (c) letter of credit; (d) no-lien agreement; and (e) certificate of insurance. (S.A. 25-26 123-27).

The July 7 resolution further specifically stated that if the conditions were not met on or before July 24, 1989, no contract would be awarded to petitioner. (S.A. 126). Martin J. Haitz, petitioner's president, testified during his deposition that he understood that the award was conditional. (S.A. 209). He also agreed that the conditions stated in the July 7 resolution were the same as those in the specifications. (S.A. 209). Petitioner failed to meet the conditions in the substance or form required by the proposed contract documents and July 7 resolution and, therefore, did not fulfill the conditions of the July 7 resolution within the compliance period. (S.A. 27-34). The Allegheny County Industrial Development Authority, in an effort to assist petitioner in meeting the terms and conditions, nevertheless adopted a second resolution on July 26, 1989, extending the compliance period until August 10, 1989. (S.A. 28, 141-42). The July 26 resolution

also reiterated the conditions set forth in the proposed contract documents, and provided, once again, that if petitioner failed to comply with the stated conditions, no contract would be awarded. (S.A. 141-42).

At the close of business on August 10, 1989, petitioner still had not produced documents meeting the terms and conditions of the proposed contract documents and foregoing resolutions. (S.A. 24). In fact, at the August 23, 1989, meeting of the Allegheny County Industrial Development Authority Board of Directors, numerous representatives of petitioner admitted its noncompliance with the crucial conditions. (S.A. 29-33).

The proposed contract agreement, included in the proposed contract documents as addendum number 4 (S.A. 90-123), was never executed by the Allegheny County Industrial Development Authority and, in fact, was never presented in execution form by any representative of petitioner.

Petitioner failed and/or refused to produce any evidence to support its position. Specifically, it did not produce: a signed contract; executed or secured performance and payment bonds as required by the proposed contract documents and the resolutions; a certificate of insurance evidencing the types and amounts of coverages specified in the proposed contract documents and the resolutions; a no-lien agreement executed and recorded by petitioner as required in the proposed contract documents and the resolutions; or any other evidence necessary to support its theory that a contract does, in fact, bind the parties. (S.A. 29-32). It utterly failed to comply with the proposed contract documents because it never satisfied the conditions; consequently, no legally binding contract existed between the parties.

The District Court granted summary judgment, concluding that there was no genuine issue of any material fact and that the

Allegheny County Industrial Development Authority was entitled to judgment as a matter of law. (App. B5-B14). Petitioner's admitted failure to provide the bonds called for by the bid documents meant that no contract was ever formed because of petitioner's failure to comply strictly with the bidding requirements. (App. B11-B12, *citing City of Philadelphia v. American Coastal, Inc.*, 704 F. Supp. 587 (E.D. Pa. 1988); and *City of Philadelphia v. Canteen Co., Division of TRW Services, Inc.*, 135 Pa. Commonwealth Ct. 575, 581 A.2d 1009 (1990)). Further, the District Court concluded that petitioner's argument that it substantially complied with the bid requirements lacked any factual or legal basis. (App. B13). The Third Circuit adopted the District Court's analysis of the contract formation issue. (App. A5-A6). It declined to address petitioner's substantial compliance argument, finding it to be at variance with Pennsylvania's requirement of strict compliance in the area of public contracts. (App. A5-A6).

Significantly, the petitioner now asserts no challenge to the lower courts' application of Pennsylvania law to the uncontested facts.

REASONS TO DENY THE PETITION

I. ABSENT ANY MERITORIOUS FACTUAL OR SUBSTANTIVE CHALLENGE TO THE SUMMARY JUDGMENT, ANY FAILURE TO CONDUCT AN ORAL HEARING BEFORE GRANTING SUMMARY JUDGMENT IS, AT MOST, A HARMLESS ERROR.

This Honorable Court should not entertain a petition for certiorari that raises no more than a harmless error. *See* 28 U.S.C. § 2111 ("On hearing of any . . . writ of certiorari . . ., the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed.R.Civ.P. 61 ("[N]o error or defect in

any ruling or order or in anything done or omitted by the court . . . in ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.''). Applying these criteria, it is clear that the failure to conduct an oral hearing before granting summary judgment is, at most, a harmless error when, as here, the complaining party cannot demonstrate how, if at all, the absence of an oral hearing prejudiced the outcome of the case.

The petitioner has not shown any articulable harm flowing from the lack of an oral hearing in the District Court. Would such a hearing have improved the decision-making function or avoided an erroneous result? This Honorable Court should not be forced to speculate if an alleged procedural error contributed to an improper result below.

The petition is silent as to any factual or substantive legal arguments petitioner could not develop satisfactorily in its affidavits, brief, and reply brief submitted to the District Court. Indeed, the petition assigns no factual or substantive error as a basis for further appellate review. The petition, instead, raises a procedural issue which apparently caused no harm whatsoever. Because petitioner abandoned any further challenge to the factual or substantive basis for the grant of summary judgment, the presence or absence of an oral hearing before entering summary judgment is a moot point. *See, e.g., Fernhoff v. Tahoe Regional Planning Agency*, 803 F.2d 979, 983 (9th Cir. 1986); *Clark Equipment Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984).

Any arguable error in failing to hold such a hearing is therefore a harmless error that should be reviewed no further. The petition for certiorari should be denied on that basis alone.

II. PETITIONER WAIVED ANY RIGHT TO CHALLENGE THE DECISION ON THE BASIS THAT IT WAS DEPRIVED OF AN ORAL HEARING BY FAILING TO REQUEST SUCH RELIEF BELOW.

Certiorari should not be granted to consider an issue that was not properly preserved below. *Cf., Beck v. Washington*, 369 U.S. 541, 550-54, 82 S.Ct. 955, 960-62, 8 L.Ed.2d 98, 107-10 (1962); *Godchaux v. Estopinal*, 251 U.S. 179, 181, 40 S.Ct. 116, 117, 64 L.Ed. 213, 214 (1919). Petitioner waived any objection to the procedure employed by the District Court by failing to request an oral hearing on the summary judgment motion. This issue was raised, for the very first time, in the brief submitted to the Third Circuit. (Amended Brief for Appellant American Atlas Corporation, at 17). By then, however, it was too late to complain about the absence of a hearing on the summary judgment motion. *See, e.g., Deutsch v. Burlington Northern Railroad Co.*, 983 F.2d 741, 745 n.2 (7th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993); *Clark Equipment Credit Corp. v. Martin Lumber Co.*, 731 F.2d 579, 581 (8th Cir. 1984) (no reversible error when first request for oral hearing came after summary judgment was granted). *See generally, Aslanidis v. U. S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993) (party opposing summary judgment must raise all arguments below and may not raise new issues for first time on appeal). Accordingly, the petition for certiorari should be denied.

III. PETITIONER WAIVED ANY CONSTITUTIONAL CHALLENGE BECAUSE NO DUE PROCESS OBJECTION WAS EVER ASSERTED BELOW.

In addition to its generalized argument that Fed.R.Civ.P. 56(c) requires an oral hearing on every summary judgment

motion, petitioner asserts that the failure to conduct such a hearing before entry of summary judgment was a denial of due process. (Petition for Writ of Certiorari, at 26). This argument, however, was raised for the first time in the petition and, therefore, is not properly before this Honorable Court.

The absence of a due process challenge below is obvious from a cursory review of the petitioner's brief below. The due process clause of the fifth amendment to the United States Constitution was never even cited below. The *entirety* of the petitioner's argument on this issue below was as follows:

> **C. The Entry of Summary Judgment was Improper In That No Hearing On The Matter Was Conducted**
>
> With the exception of a pre-trial conference, American has never entered a courtroom in this case. However, when there was a motion for summary judgment which could dispose of its entire claim, American was entitled to a hearing on the matter. *Sames v. Gable*, 732 F.2d 49 (3d Cir. 1984); *Season-All Industries, Inc. v. Turkiye Sisi Ve Cam Fabribalari [sic]*, 425 F.2d 34 (3d Cir. 1970).
>
> Based upon the foregoing, it was improper for the district court to have granted summary judgment in favor of ACIDA without having a hearing on the matter. Therefore, it respectfully submitted that a district court's decision should be vacated pending a hearing, to which American is entitled.

(Amended Brief for Appellant American Atlas Corporation, at 17).

Because this due process issue was waived, the petition for certiorari should be denied.

IV. THERE IS NO INTRACIRCUIT CONFLICT OF SUCH MAGNITUDE AS TO WARRANT INTERVENTION THROUGH A GRANT OF CERTIORARI.

Petitioner mistakenly assigns a conflict within the Third Circuit as a basis for granting certiorari. (Petition for Writ of Certiorari, at 17-23). Ordinarily, a conflict between decisions rendered by different panels within the same circuit is not a sufficient basis for granting certiorari. *Davis v. United States,* 417 U.S. 333, 340, 94 S. Ct. 2298, 2302, 41 L.Ed.2d 109, 115 (1974). Any such difference of opinion is an intramural matter best left to the circuit court to resolve through *en banc* procedures. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice,* § 4.6 (6th ed. 1986). Curiously, petitioner neglected to seek reargument on the basis of any purported conflict within the Third Circuit over the right to an oral hearing on every summary judgment motion. In any event, there is no conflict of such a magnitude within the third Circuit to justify the extraordinary action requested.

The leading case in the Third Circuit on the issue of oral hearings in summary judgment matters is *Anchorage Associates v. Virgin Islands Board of Tax Review,* 922 F.2d 168 (3d Cir. 1990). Petitioner's attempt to distinguish that case (Petition for Writ of Certiorari, at 20-21) is unavailing. In that case, the court recognized unequivocally that Fed.R.Civ.P. 56 does not require an oral hearing in every case before summary judgment can be entered. 922 F.2d at 176. "An opportunity to submit written evidence and argument satisfies the requirements of the rules." *Id.* (footnote omitted). The court went on to note that the appellant in that case had been afforded the opportunity to submit briefs and evidentiary materials and, thus, "would have no cause for complaint if the district court had otherwise complied with Rule 56." *Id.* at 176-77. Here, as in *Anchorage Associates,* the

aggrieved party had ample notice and an opportunity to be heard on the merits of the summary judgment motion. There being no other arguable procedural defect below, this petitioner has no cause to complain. Its opposition to the motion was bereft of any factual or substantive legal support. Its belated and unprecedented attack on the summary judgment procedure should not be countenanced by this Honorable Court.

Contrary to petitioner's suggestion (Petition for Writ of Certiorari, at 21-22), the Third Circuit properly applied *Anchorage Associates* in its subsequent decision in *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). There, the Third Circuit considered the type of hearing contemplated by the False Claims Act, 31 U.S.C. § 3730. In holding that Congress did not require a live, formal proceeding in that act, the Third Circuit analogized to the hearing of a summary judgment motion under rule 56. 944 F.2d at 1155. The court then accurately recited its prior holding, in *Anchorage Associates*, that the rule does not require an oral hearing before judgment is entered. 944 F.2d at 176. Thus, the citation to *Anchorage Associates* was not *dicta* and, more importantly, it was a correct application of that case.

The other Third Circuit cases cited by the petitioner do not conflict with *Anchorage Associates* and *United States ex rel. Stinson*. Instead, the Third Circuit expressly condoned summary disposition without oral hearings so long as the parties were given ample notice that the motion would be decided on their written submissions. In *Season-All Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S.*, 425 F.2d 34, 39 (3d Cir. 1970), the Third Circuit criticized the practice of deciding summary judgment motions without oral argument, but it did *not* set out any absolute rule mandating oral hearings in all cases. The court "believe[d] that it [was] undesirable in general for a district

court to enter summary judgment after receiving briefs and without holding a hearing *unless it makes clear in its order that all affidavits and counter-affidavits must be filed with the briefs.*" *Id.* (footnote omitted; emphasis added). Further, with regard to the effect of Fed.R.Civ.P. 78, which authorizes the District Courts to determine motions on briefs alone, the Third Circuit stated: "we believe resort should not be had to this provision on a motion for summary judgment *unless it is made clear beyond all doubt that the parties must present their affidavits and counter affidavits in addition to whatever facts appear in the pleadings, depositions, answers to interrogatories, and admissions or file.*" 425 F.2d at 39 (emphasis added). In *Season-All,* the summary judgment was vacated because of the deplorable state of the record, which the court characterized as "factually murky" and "obscure," *not* because of the lack of oral hearings. 425 F.2d at 39-40. In *Sames v. Gable,* 732 F.2d 49, 51-52 (3d Cir. 1984), the court factually noted the absence of a hearing, but the true reason the summary judgment was reversed was because important discovery had not been completed. Likewise, the state of the record—and not the absence of a hearing—was the basis for reversal of the summary judgment in *St. Surin v. Virgin Islands Daily News, Inc.,* 21 F.3d 1309, 1313-15 (3d Cir. 1994). In none of these cases did the court overturn the summary judgment simply because there had been no oral argument. To the contrary, as *Anchorage Associates* makes clear, the hearing requirement of Fed.R.Civ.P. 56(c) can be satisfied by giving the non-moving party notice and the opportunity to submit written evidence and argument opposing the motion. 922 F.2d at 176-77.

The motion for summary judgment was filed on or about January 24, 1994. (S.A. 3). At a pretrial conference held on February 23, 1994, the District Court ordered that petitioner should respond by March 10, 1994. (S.A. 6). By agreement of the parties, the District Court extended the response date until March

31, 1994. (S.A. 4, 6-7). That day, petitioner filed a document entitled response to motion for summary judgment, which purported to controvert some of the allegations of the motion; an affidavit of Martin J. Haitz, to which it attached various evidentiary materials supposedly supporting its substantial compliance argument; and a brief in opposition to motion for summary judgment wherein petitioner addressed its theory why summary judgment was inappropriate. (S.A. 4). Thereafter, each party filed reply briefs. (S.A. 4). After obtaining leave of court and an extension, the petitioner's last brief was filed on July 19, 1994. (S.A. 4). At no time did it ever request an oral argument or other form of oral hearing. The summary judgment was not entered until December 16, 1994. (S.A. 5). Surely, the petitioner had notice and exercised its opportunities to present evidence and argument in opposition to the motion.

Because petitioner developed its evidence and arguments below sufficiently in advance of the disposition of the Allegheny County Industrial Development Authority motion for summary judgment, there was no abuse of discretion in deciding the merits of the motion without oral argument. Moreover, this issue, raised for the first time on appeal, is not an adequate reason to disturb a summary judgment that is otherwise proper based on the record and the law. *See, e.g., Clark Equipment,* 731 F.2d at 581. Accordingly, the petition should be denied.

V. THERE IS NO CONFLICT BETWEEN THE CIRCUITS REQUIRING THIS HONORABLE COURT TO INTERVENE.

Petitioner asserts that the decision below conflicts with those of other circuits on the necessity of an oral hearing before deciding a summary judgment motion. (Petition for Writ of Certiorari, at 24-25). This is simply wrong.

Every circuit which has decided this issue—whether a pre-disposition hearing is required under rule 56—has ruled consistently with the Third Circuit that no such hearing is required. *See, e.g., Bratt v. International Business Machines Corp.*, 785 F.2d 352 (1st Cir. 1986); *Sakaria v. Trans World Airlines*, 8 F.3d 164 (4th Cir. 1993), *cert. denied*, ____U.S. ____, 114 S.Ct. 1835, 128 L.Ed.2d 463 (1994); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854 (5th Cir. 1983); *Grigoleit Co. v. United Rubber, Cork, Linoleum & Plastic Workers of America, Local No. 270*, 769 F.2d 434 (7th Cir. 1985); *Clark Equipment Credit Corp. v. Martin Lumber Co., supra* (Eighth Circuit); *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920, 112 S.Ct. 1295, 117 L.Ed.2d 518 (1992); *Geear v. Boulder Community Hospital*, 844 F.2d 764 (10th Cir.), *cert denied*, 488 U.S. 927, 109 S.Ct. 312, 102 L.Ed.2d 331 (1988); *L.S.T., Inc. v. Crow*, 49 F.3d 679 (11th Cir. 1995); *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975).

Petitioner has cited no cases which directly contradict the Third Circuit's ruling.

The only cases cited by the petitioner are readily distinguishable in that they address specific local procedural rules concerning hearings on summary judgment motions. *Dredge v. Penny*, 338 F.2d 456 (9th Cir. 1964); *Dayco v. Goodyear Tire*, 523 F.2d 389 (6th Cir. 1975); and *Yahama Corp. of America v. Stonecipher's Baldwin Pianos & Organs, Inc.*, 975 F.2d 300 (6th Cir. 1992), upheld local rules which required parties to request oral argument on pending summary judgment motions. *Bagby v. United States*, 199 F.2d 233 (8th Cir. 1952), held that a litigant waived her right to an oral hearing by failing to make a request in the lower court. *Jasinski v. Showboat Operating Co.*, 644 F.2d 1277 (9th Cir. 1981), granted an aggrieved party relief because a local rule designed to afford notice and an opportunity to

respond had been breached. Examination of the Third Circuit's decision plainly reveals that this procedural issue was decided without reference to any comparable local rule. (App. A6-A7).

Petitioner now claims, for the very first time, that it was entitled to a hearing under Local Rule 7.1 of the United States District Court for the Western District of Pennsylvania (Petition for Writ of Certiorari, at 19). However, review of the brief below demonstrates that petitioner never objected to the procedure employed as a violation of Local Rule 7.1. The argument devoted to this procedural issue below is set forth at length at page 8 of this brief. Obviously, petitioner is raising Local Rule 7.1 for the first time in its petition. It cannot ambush the Third Circuit by citing this Court to a procedural rule which it waived below.

In short, the petitioner has failed to demonstrate that the Third Circuit decision conflicts with that of any other Circuit. Petitioner's belated attempt to create a conflict by citing a rule it overlooked below is gamesmanship that cannot be rewarded by a grant of certiorari.

CONCLUSION

There is no compelling reason to grant certiorari. Although the petitioner never requested an oral hearing on the summary judgment motion and despite its ample opportunities to present evidence and argument opposing summary judgment, petitioner insists that the absence of an oral hearing requires further review. However, no relief can be granted because any error in the procedural aspect of the case must be viewed as a harmless error absent any legitimate showing that the petitioner was somehow unable to present factual or substantive responses adequately in the District Court. Even if this procedural issue is not harmless or was not waived, the petitioner had opportunities to present its unsupported factual claims and untenable legal arguments to the

District Court and it never asked for an opportunity for oral argument or any other sort of oral hearing. The issues were properly framed and fully addressed on briefs and evidentiary submissions. There was no abuse of discretion in granting the motion without an oral hearing. Moreover, there is no legitimate basis to complain that the decision below conflicts with the decisions of the Third Circuit or any other Circuit. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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